IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,	)	
	)	
Plaintiff,	)	
	)	No. 13-cv-04307
v.	)	
	)	Judge Andrea R. Wood
DOLGENCORP, LLC d/b/a DOLLAR GENERAL,	)	
	)	
Defendant.	)	

ORDER

Plaintiff's motion to strike "Exhibit 5" of Defendant's Memorandum in Opposition to Plaintiff's motion for partial summary judgment and to bar any future submission of anything said or done during conciliation [276] is granted. See the accompanying Statement for details.

STATEMENT

This case concerns the allegedly discriminatory use of criminal background checks in hiring and firing determinations by Defendant Dolgencorp, LLC ("Dollar General"). After receiving charges of discrimination from two former Dollar General employees, the United States Equal Employment Opportunity Commission ("EEOC") investigated and determined that there was reasonable cause to believe that Dollar General had engaged in employment discrimination on the basis of race. Thereafter, the EEOC brought this lawsuit against Dollar General under Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. §§ 2000e *et seq.* Dollar General's answer to the EEOC's complaint asserted 18 affirmative and other defenses. (*See* Ans. at 10–13, Dkt. No. 13.) The EEOC subsequently filed a motion for partial summary judgment on Dollar General's seventh and eighth enumerated defenses. (Dkt. No. 196.) Those defenses contend: that the EEOC's claims are barred as beyond the scope of the charges of discrimination and the EEOC's investigation (7th enumerated defense), and that the EEOC failed to satisfy the statutory precondition for bringing suit when it failed to conciliate with Dollar General (8th enumerated defense). During the briefing of the EEOC's motion, Dollar General introduced its Exhibit 5, which included correspondence between the EEOC and Dollar General during their conciliation efforts. The EEOC then filed this motion to strike Exhibit 5 and to bar the future submission of anything said or done during conciliation.

Section 2000e-5(b) of Title 42 provides that if the EEOC determines there is reasonable cause to believe that a charge of discrimination is true, the EEOC "shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned." 42 U.S.C. § 2000e-5(b). The Supreme Court in *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645 (2015), made clear that in order to use correspondence from conciliation efforts as evidence in a subsequent proceeding, the party introducing the evidence must obtain "'the written consent of the persons concerned'—***both the employer and the complainant***." *Id.* at 1655 (emphasis added).

The Court has reviewed Exhibit 5 for purposes of the EEOC's motion to strike. Exhibit 5 clearly includes communications between the EEOC and Dollar General relating to their pre-suit conciliation efforts. The EEOC states that it has not consented to the introduction of these communications as evidence and Dollar General does not contend otherwise. Therefore, by the plain terms of the statute, the correspondence in Exhibit 5 cannot be introduced as evidence and must be stricken. Similarly, as a prospective matter, the Court holds that neither party may introduce anything "said or done" during the conciliation efforts, without the consent of the other party.

The Court finally observes that the Court's consideration of Exhibit 5 would have had no effect on its ruling on EEOC's motion for partial summary judgment. *Mach Mining* made clear that "a court looks only to whether the EEOC attempted to confer about a charge, and not to what happened (*i.e.*, statements made or positions taken) during those discussions." *Mach Mining*, 135 S. Ct. at 1656. As Exhibit 5 included "what happened" during the conciliation efforts between the parties, this Court could not consistent with the Supreme Court's guidance consider the communications in Exhibit 5 in fashioning its ruling on the EEOC's motion.

Dated: April 10, 2017

Andrea R. Wood
United States District Judge